RENDERED: OCTOBER 19, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002537-MR

JAMIE L. ALLEN — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 06-CR-00049

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HOWARD, JUDGE; GUIDUGLI and KNOPF, SENIOR JUDGES.[1]

GUIDUGLI, SENIOR JUDGE: Jamie L. Allen appeals the Franklin Circuit Court judgment and sentence following a jury trial convicting him of trafficking in a controlled substance and of being a persistent felony offender. We affirm.

On January 24, 2006, a confidential informant ("the CI"), under the direction and supervision of Franklin County Sheriff's Office Detective Pat Melton,

[1] Senior Judges Daniel T. Guidugli and William L. Knopf sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

contacted Allen and arranged the purchase of one-half ounce of crack cocaine for $600. Det. Melton drove the CI to the Speedway on Versailles Road and, after searching him, provided him with a recording device. The CI then contacted Allen and Allen arrived at Speedway with an unidentified passenger.

As Allen was pumping gas into his car, the CI handed Allen cash. He then entered Allen's car, received a small package from the unidentified passenger and got out of the car. After Allen paid for his gas and left the Speedway, the CI returned to Det. Melton's vehicle where he had observed the entire series of events. The CI gave the package, a plastic bag containing suspected crack cocaine, to Det. Melton.

Det. Melton submitted the substance to the Kentucky State Police Forensic Lab for testing, where it tested positive for cocaine. Allen was subsequently convicted on the charges of Trafficking in a Controlled Substance in the First Degree and being a Persistent Felony Offender in the First Degree. This appeal followed.

Before us, Allen argues four issues. They are: 1) Allen's conviction should be reversed due to an incomplete record; 2) the trial court erred in not granting a directed verdict or a JNOV for the trafficking charge due to lack of evidence that Allen had trafficked cocaine; 3) the trial court erred in not granting a directed verdict or a JNOV for the trafficking charge due to lack of evidence that the suspected substance sold to the CI on January 24, 2006, was cocaine; and 4) the trial court erred by not granting Allen a new trial after proof established that Det. Melton violated KSP regulations pertaining to the use of confidential informants.

Allen first argues that his convictions should not stand because the paper copies of the jury instructions and verdict form failed to make it into the record. RCr 9.24 reads:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order, or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order unless it appears to the court that the denial of such relief would be inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties.

Although the jury instructions and verdict form failed to make it into the written record, they were both read into the record and recorded by video tape, thus creating a complete record. Their absence, in written form, is harmless error. We have ruled that court orders or directions missing from the written record can be re-created if necessary.

> The general rule is, although there are exceptions to it, that when an order or direction of court had been omitted from the record by the inadvertence or mistake of the clerk or judge, and there is record evidence showing that all the steps necessary to have the omitted order or direction entered were duly made and taken, and by a reference to this record *the court without any other information or evidence can know what judgment or order was intended to be entered*, it may from this record evidence enter as of the date when it should have been entered what is called a nunc pro tunc order or such order as would have been entered except for the omission. In other words, the court may do that which except for inadvertence or mistake would have been done. In making such entry the court is only correcting its own omission or

> mistake, or the omission or mistake of its clerk. It is not the making of a new order or direction, but the new entry of an old order or direction. It is merely placing the parties to the record in the condition the court intended they should be.
>
> *Ralls v. Sharp's Adm'r*, 140 Ky. 744, 131 S.W. 998 (Ky. App. 1910)

(emphasis added). We do not believe the absence of the paper copies of the instructions and verdict creates an incomplete record, particularly because they can be referenced by videotape. Therefore, the substantial rights of neither party have been affected, making this error harmless.

Allen's next argument is that there was not sufficient evidence to support the jury's verdict that he trafficked cocaine. The standard of review when considering the sufficiency of evidence to support a criminal conviction is:

> whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Potts v. Commonwealth, 172 S.W.3d 345, 349 (Ky. 2005) (citing *Jackson v. Virginia*, 443 U.S. 307, 318-319, 99 S.Ct. 2781, 2788-89, 61 L.Ed.2d 560 (1979)) (emphasis in original).

The charge of trafficking is governed by KRS 218A.1412. The relevant language of KRS 218A.1412(A) states: "A person is guilty of trafficking in a controlled substance in the first degree when he knowingly and unlawfully traffics in: a controlled substance..." KRS 218A.010(34) defines traffic as meaning "to manufacture, distribute, dispense, sell, transfer, or possess with intent to manufacture, distribute, dispense, or sell

a controlled substance." There is no disagreement that cocaine is a controlled substance. The jury in the trial court was instructed that to "sell" means to dispose of a controlled substance to another person for payment or other consideration. Allen contends that it was the unidentified passenger, not him, who possessed and transferred the package to the CI, thus making the unidentified passenger guilty of the crime. The issue here is one of semantics. A transfer is "any mode of disposing or parting with an asset or an interest in an asset, including the payment of money...The term embraces every method – direct or indirect." Black's Law Dictionary 1503 (7th Ed. 1999). While it may not have been Allen's hands that held the package at the time it was given over to the CI, he was nonetheless integral in the transaction. His actions varied from direct to indirect, in that he arranged the meeting with the CI; drove the car containing the substance and the passenger; and accepted the money from the CI. This Court is satisfied that his role was significant enough that the jury could have adjudged him as having disposed of the package to the CI.

Allen next argues that the Commonwealth failed to establish that the cocaine introduced at trial was the same substance sold to the CI on January 24, 2006. When questioned about the handling procedures of alleged controlled substances, Det. Melton confirmed that any substance that is part of an investigation and suspected to be a controlled substance is handled with great care and not tampered with. He further testified that a substance is weighed before being sent to the lab for testing. When confronted with the discrepancy between the recorded weight of the substance in the case

notes (14.76 grams) and the recorded weight in the lab's notes (9.876), Det. Melton explained that often, when creating a case file and getting a case number, the gram weight of a substance is communicated to him based on the alleged weight of the substance at the time of purchase. In this case, the CI had bargained for a one-half ounce, the approximate equivalence of 14.17 grams. After reviewing the trial recording and viewing this information in the light most favorable to the prosecution, we conclude, as the jury also seemingly did, that the substance which tested positive as cocaine at the lab is the same substance that the CI received on January 24, 2006. More importantly, we find that the jury could have concluded so and thus properly found sufficient information to create the essential elements of the crime of trafficking by Allen.

Allen's fourth and final argument is that he is entitled to a new trial because Det. Melton allegedly violated a KSP policy prohibiting the use of confidential informants who are on probation. We disagree.

At trial, the CI testified that he had been placed on 150 days of probation sometime in June of 2005. As the Commonwealth correctly points out in its brief, the CI's probation period would have ended sometime in November of 2005, well before the January 24, 2006 transaction. Accordingly, we hold that Allen has failed to prove non-compliance with the KSP policy, and has also failed to prove any way in which the use of this particular CI impeded Allen's substantial rights.

Accordingly, the judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR.

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